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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91227978
Party	Defendant The Insurance Source
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Combined Insurance Company of America Opposer, v. The Insurance Source, Applicant.	Opposition No. 91227978 Application Serial No. 86734955 Mark: We Make Health Insurance Easier.

APPLICANT'S A) RESPONSE TO OPPOSER'S MOTION TO STRIKE ANSWER AND B) MOTION FOR LEAVE TO FILE AN AMENDED ANSWER

Applicant The Insurance Source ("Applicant"), by and through counsel Erik M. Pelton & Associates, PLLC, hereby responds to Opposer Combined Insurance Company of America's ("Opposer") Motion to Strike Applicant's Answer to the Notice of Opposition ("Answer"). Applicant also hereby moves for leave to file an amended answer.[1] The Proposed Amended Answer is attached as Exhibit A.

At the outset, Applicant notes that the original Answer, Docket No. 8, was filed and served by Applicant *pro se*. After Opposer filed the instant Motion to Strike, Applicant retained counsel and now seeks leave to file an amended answer.

[1] Concurrently with its Motion to Strike, Opposer filed a Petition to Cancel another mark owned by Applicant containing the entirety of the opposed mark, WE MAKE HEALTH INSURANCE EASIER. Cancellation No. 92064138 (instituted July 29, 2016). The complaint in the cancellation proceeding is substantially similar to the Notice of Opposition, and the cases involve identical parties and issues. Applicant is filing its answer in that proceeding concurrently with this filing. Applicant is also concurrently filing a motion to consolidate these two proceedings.

ARGUMENT

Opposer moves to strike Applicant's Answer on the basis that the Answer was improperly served and that the Answer was legally insufficient. If the Board grants Applicant's motion for leave to file an amended answer, Opposer's motion to strike the original answer is moot. In the event that the Board denies the motion for leave, Applicant requests that the Board deny Opposer's Motion to Strike and grant Applicant, through its new counsel, time to file an amended answer.

Motions to strike are not favored, and matter will not be stricken unless it clearly has no bearing upon the issues in the case. TBMP § 506.01; *Ohio State University v. Ohio University*, 51 USPQ2d 1289, 1292 (TTAB 1999). Here, the Motion to Strike should be denied because, even if Applicant's *pro se* service was technically deficient, Opposer had notice of the Answer and any deficiency was an inadvertent. Furthermore, the *pro se* Answer provides sufficient information and arguments from which admissions and denials could reasonably be interpreted, and thus Opposer has adequate notice of Applicant's claims and defenses. *See Turner Entmt. Co. v. Nelson*, 38 USPQ2d 1942 (TTAB 1996). There is therefore no reason to strike the answer in its entirety.

1. Applicant's Answer Should Not Be Stricken on the Basis of Insufficient Service

Opposer argues that Applicant's Answer should be stricken in its entirety because Applicant failed to meet the technical requirements of the Board's rules by not attaching a certificate of service to either its filed answer or its served answer. *See* 37 CFR § 2.119; TBMP § 113.

Applicant filed its answer with the Board *pro se* on June 14, 2016. Docket Doc. No. 8. At the time, Applicant was under the belief that by filing its Answer, Opposer would be

immediately notified via the Board's electronic filing system and thus be served. Upon realizing this was not the case, Applicant served Opposer with a copy of the Answer on July 14, 2016 by email. At the time, Applicant was not represented by counsel and lacked familiarity with the technical requirements of the rules. Failure to meet the technical requirements of the law, however, has not prejudiced Opposer in any way; penalizing Applicant for failing to meet the technical requirements of the rules would instead prejudice Applicant.

Applicant's failure to serve Opposer with its Answer at the time of filing was inadvertent. Prior Board practice did not require parties to a Board proceeding to serve filings because the Board undertook service on parties' behalf. The Board recently proposed a new rules package meant to take effect within the year that once again does not require parties to serve opposing litigants with filings. *See* "Miscellaneous Changes to Trademark Trial and Appeal Board Rules of Practice; Proposed Rules," 81 Fed. Reg. 19296 (Apr. 4, 2016). Applicant, who was proceeding without counsel, believed that service was unnecessary and that filing the Answer with the Board would effectuate service, thus giving Opposer notice of the Answer. Upon realizing its mistake, Applicant immediately took steps to rectify the service issue and emailed Opposer a copy of the Answer. Docket Doc. No. 10, at 2.

Federal Rule of Civil Procedure 12(f) states "The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act: (1) on its own; or (2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading." Fed. R. Civ. P. 12(f). Failure to meet the technical requirements of service is not a ground to strike material from an answer. *See* Fed. R. Civ. P. 12(f); TBMP § 506.

Furthermore, Applicant's failure to attach a certificate of service has not in any way prejudiced Opposer. Applicant has provided Opposer with a copy of the Answer. An absent certificate of service does not prevent Applicant's service from achieving the goals behind the service rules.

Opposer has full notice of Applicant's filing. Applicant has retained counsel to prevent further misunderstandings of the Rules. The service issue is moot, and Applicant's Answer should not be stricken in its entirety on the basis of improper service.

2. Applicant's Answer Sets Out Allegations and Defenses Sufficient to Admit or Deny Opposer's Claims and Provides Opposer Notice of Applicant's Defenses

The primary purpose of pleadings, under the Federal Rules of Civil Procedure, is to give fair notice of the claims or defenses asserted. *See* TBMP §§309.03 and 311.02; *Harsco Corp. v. Electrical Sciences Inc.*, 9 USPQ2d 1570 (TTAB 1988). The Answer provided Opposer with sufficient notice of Applicant's claims and defenses.

Opposer argues that Applicant's pro se answer is not simple, concise, or direct, and that the Answer is difficult to interpret. Applicant notes that Paragraphs 1, 2, 4, and 6 of the Notice of Opposition each contain numerous factual statements per numbered paragraph, and are themselves not very simple, concise or direct. Docket Doc. No. 1, at 2-3.

The factual allegations of the complaint fall into three clear categories: allegations concerning Opposer that Applicant would not have sufficient information to admit or deny, allegations supported by the public record, and generic allegations concerning likelihood of confusion that Applicant's Answer clearly denies. Applicant further alleges numerous valid affirmative defenses in its original answer: Applicant alleges that Opposer's marks differ from Applicant's mark in sound, appearance, meaning and connotation; Applicant alleges that its services (qualified health insurance brokerage services) are not related to Opposer's (insurance

underwriting, excluding qualified health insurance); Applicant alleges that consumers buying the Parties' respective services are sophisticated or exercise a high degree of care, and that the Parties' services are marketed to different classes of consumers in different channels of trade; Applicant alleges that Opposer's mark is both commercially and conceptually weak for purposes of a confusion analysis; and Applicant alleges that there is no evidence of actual confusion.

Even if Applicant's Answer is imperfect, it includes the necessary substance to adequately provide notice of Applicant's claims and defenses to Opposer. Therefore, to the extent necessary, Applicant's *pro se* Answer should interpreted rather than stricken. *See Turner Entmt. Co.*, 38 USPQ2d 1942.

APPLICANT'S MOTION FOR LEAVE

Applicant respectfully moves for leave to file an Amended Answer pursuant to Fed. R. Civ. P. 15(a). Under the Federal Rules, a party may amend a pleading as a matter of course within 21 days of serving it, or any time before trial with consent of the opposing party or leave from the tribunal. Fed. R. Civ. P. 15(a).[2] "The court should freely give leave when justice so requires." *Id.* "[T]he Board liberally grants leave to amend pleadings at any stage of a proceeding when justice so requires, unless entry of the proposed amendment would violate settled law or be prejudicial to the rights of the adverse party or parties." TBMP § 507.02. A motion to amend should only be denied if the nonmoving party can demonstrate: "undue delay, bad faith or dilatory motive on the part of the movant, . . . [or] undue prejudice to the opposing party by virtue of allowance of the amendment . . . ." *Foman v. Davis*, 371 US 178, 182 (1962)

[2] Although Applicant seeks leave to amend under Rule 15(a)(2), Applicant notes that the Answer was technically only served on July 14, 2016. This motion for leave to amend therefore falls within 21 days of service of the original pleading. *See* Fed. R. Civ. P. 15(a)(1)(A).

Here, Applicant seeks leave to file an amended answer because circumstances have changed. Applicant's original Answer was filed *pro se*, without the assistance of counsel. Applicant has since retained counsel and wishes to file a conventional answer that more obviously complies with the Federal Rules and Board practice than the original Answer. The Proposed Amended Answer, attached as Exhibit A, clearly and succinctly admits and denies Opposer's allegations in numbered paragraphs and articulates Applicants defenses simply, concisely, and directly. *See* Fed. R. Civ. P. 8(e)(1).

Filing an amended answer at this stage of the proceedings, before the discovery conference has taken place, would not prejudice Opposer in any way. In fact, in light of Opposer's arguments in its Motion to Strike, filing an amended answer may put Opposer in a better position than it currently is. Moreover, Opposer has also filed a Petition to Cancel another mark owned by Applicant containing the entirety of the opposed mark, WE MAKE HEALTH INSURANCE EASIER. Cancellation No. 92064138. The complaint in the cancellation proceeding is substantially similar to the Notice of Opposition, and the cases involve identical parties and issues. Applicant, in answering the allegations of the petition for cancellation, will move to consolidate these two proceedings.

Applicant has attached a proposed Amended Answer to this document as Exhibit A. The claims and defenses included are substantially similar to those included in Applicant's original Answer, and Applicant does not seek leave at this time to plead any counterclaims.

Because Applicants' motion for leave and their [Proposed] Amended Answer to Notice of Opposition is timely filed and will not unduly prejudice Opposer, Applicant respectfully requests that its motion for leave be granted and the attached [Proposed] Amended Answer to Amended Notice of Opposition be accepted by the Board and made the answer of record.

Dated this 8th day of August, 2016.

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Attorney for Applicant

Enclosure:
Applicant's Proposed Amended Answer

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of Applicant's A) Response To Opposer's Motion To Strike Answer And B) Motion For Leave To File An Amended Answer has been served on the following by delivering said copy on August 8, 2016, via First Class Mail, to counsel for Opposer at the following address:

TIMOTHY D PECSENYE
BLANK ROME LLP
ONE LOGAN SQUARE
PHILADELPHIA, PA 19103

By: _____
Erik M. Pelton, Esq.

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Combined Insurance Company of America Opposer, v. The Insurance Source, Applicant.	Opposition No. 91227978 Application Serial No. 86734955 Mark: We Make Health Insurance Easier.

APPLICANT'S AMENDED ANSWER

COMES NOW Applicant The Insurance Source ("Applicant") by and through Counsel, Erik M. Pelton & Associates, PLLC, and Answers the Notice of Opposition filed by Combined Insurance Company of America (hereinafter "Opposer"), and assigned Opposition No. 91227978.

Applicant notes that Paragraphs 1, 2, 4, and 6 of the Opposition contain multiple statements and allegations, and are not simple, concise, or direct. *See* Fed. R. Civ. P. 8(d)(1).

Applicant hereby responds, solely for the purpose of this proceeding, to each of the grounds set forth in the Notice of Opposition, as follows:

1. Applicant is without information sufficient to form a belief as to the truth of the allegations in paragraph 1 of the Notice of Opposition, and therefore denies them.

2. Applicant is without information sufficient to form a belief as to the truth of the allegations in paragraph 2 of the Notice of Opposition, and therefore denies them. The public records speak for themselves.

3. Applicant is without information sufficient to form a belief as to the truth of the allegations in paragraph 3 of the Notice of Opposition, and therefore denies them.

4. Applicant is without information sufficient to form a belief as to the truth of the allegations in paragraph 4 of the Notice of Opposition, and therefore denies them.

5. Paragraph 5 does not call for an admission or a denial.

6. Admitted.

7. Admitted.

8. Applicant is without information sufficient to form a belief as to the truth of the allegations in paragraph 8 of the Notice of Opposition, and therefore denies them.

9. Applicant is without information sufficient to form a belief as to the truth of the allegations in paragraph 9 of the Notice of Opposition, and therefore denies them.

10. Denied.

11. Denied.

12. Denied.

13. Denied.

14. Denied.

AFFIRMATIVE DEFENSES

FURTHERMORE, Applicant sets forth the following in support of its defense:

15. The term "INSURANCE" is highly descriptive or generic as used in connection with the services of Opposer.

16. The term "EASY" is highly suggestive or descriptive as used in connection with the services of Opposer.

17. Opposer's LET'S MAKE THIS EASY marks are conceptually weak and diluted.

18. Opposer's marks are commercially weak and diluted.

19. There are numerous third-party registrations for marks including the term EASY and similar themes of "making it easy" used in connection with insurance and related goods and services on the Principal Register, including but not limited to those listed in the table below:

Reg. No.	Mark	Identification of Goods and Services
3284234	aspen GROUP BENEFIT ADVISORS solutions made easy	Class 36: insurance underwriting services in the fields of group and individual health, life, disability and long term care; mutual fund investments; financial analysis and consultation; and financial administration of retirement plans, estate plans and business continuation plans
3837146	PMA Cinch Risk Management Information Made Easy	Class 36: Electronic processing of insurance claims and payment data
3685234	BENEFITS MADE EASY @ WORK	Class 36: Administration of voluntary employee benefit plans concerning insurance and finance; administration and underwriting of insurance in the fields of life, health and accidental injury, and life and health annuities; administration, underwriting, brokerage, management and financial investment services in the field of annuities; administration of pre-tax benefit programs for employee transportation and cafeteria plans; on-site and/or telephone counseling in the field of employee benefit plans concerning insurance and finance
3193689	SO EASY A CAVEMAN CAN DO IT.	Class 36: Insurance brokerage; insurance underwriting services for all types of insurance, insurance claims processing, insurance claims administration, and providing information about insurance via the Internet; providing insurance underwriting services for all types of insurance via the Internet
3922832	LANG INSURANCE SERVICE INSURANCE MADE EASY!	Class 36: Insurance agency services

4045307	YOU NEED INSURANCE, WE MAKE IT EASY!	Class 36: Insurance agency services
4548155	EASIER THAN EASY	Class 36: Brokerage services for retail insurance agents to submit, quote, bind and issue commercial property and casualty umbrella risks
4615167	The Easy To Understand Life Insurance Plan	Class 36: Consulting and information concerning insurance
4714036	Travel Insurance Made Easy	Class 36: Insurance agency services and insurance brokerage services in the field of travel insurance

20. Opposer's Marks are entitled to a narrow scope of protection from subsequent users of other marks that include the term "EASY" in connection with insurance and related goods and services.

21. Opposer's services are materially different from Applicant's services.

22. Applicant is a broker of qualified health insurance.

23. Applicant seeks registration of its mark in connection with "Online insurance brokerage specializing in health, life, disability, and dental insurance."

24. On information and belief, Opposer is an insurance underwriter that does not offer qualified health insurance plans.

25. Opposer's marks are registered in connection with "Underwriting all forms of life, accident and health insurance."

26. Opposer's underwriting services are marketed to a different class of consumers than Applicant's brokerage services are.

27. Consumers of Opposer's services are sophisticated purchasers.

28. Consumers of Applicant's services exercise a high degree of care deciding whether to purchase them.

29. Opposer's marks are not the same as or confusingly similar to Applicant's mark.

30. Opposer's marks and Applicant's mark have different appearances

31. Opposer's marks and Applicant's mark sound different.

32. Opposer's marks and Applicant's mark have different connotations and meanings.

33. Opposer's marks and Applicant's mark have different overall commercial impressions.

34. Applicant's mark and the pleaded marks of Opposer are not likely to cause confusion, mistake or deception among purchasers as to the source of Opposer's and Applicant's respective services.

35. Opposer is not likely to be damaged by registration and use of Applicant's mark.

WHEREFORE, Applicant prays that the Trademark Trial and Appeal Board deny the Notice for Opposition.

Dated this 8th day of August, 2016.

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